Amanah Merchant Bank Bhd v Sumikin Bussan Kaisha Ltd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3-22-655-89
VC GEORGE J
2 OCTOBER 1992

Civil Procedure *— Summary judgment — Conflict of facts — Matters of law — Whether bona fide triable issue in existence — Rules of the High Court 1980 O 14*

Contract *— Guarantee — Surety — Whether surety may contract out of rights given by statute — Contracts Act 1950 s 94*

Agency *— Receiver and manager — Debenture — Receiver and manager of borrowing company appointed by debenture-holder — Whether receiver and manager agent of borrower or debenture-holder*

Agency *— Liability of agent — Negligence — Receiver and manager — Whether receiver and manager negligent in not selling assets at better price — Whether bona fide triable issue existed*

Agency *— Liability of agent — Negligence — Receiver and manager appointed by debenture-holder — Selling of assets — Proceeds of sale credited to account of borrower with creditor — Delay in crediting — Whether delay amounted to negligence — Whether bona fide triable issue existed*

A consortium of financial institutions, which included the plaintiff and with the plaintiff acting as the agent of the consortium, had provided certain credit facilities to a company. The securities for the facilities included a debenture creating a fixed charge over certain lands and a floating charge over, inter alia, the undertakings of the borrower. There was also a joint and several guarantee in respect of the moneys provided under the facilities executed by the defendant and another company.

The borrower defaulted in repayment and the plaintiff on behalf of the consortium appointed a receiver and manager of the borrower. The receiver and manager apparently managed the business of the borrower for a while and thereafter sold the assets of the borrower and eventually remitted the proceeds of the sale to the plaintiff. There was a shortfall and the plaintiff made a demand for the share of the shortfall that the defendant was to pay under the guarantee. The defendant failed to pay the amount and the plaintiff commenced an action for recovery of the amount. The plaintiff applied for summary judgment against the defendant but the senior assistant registrar dismissed the application. The plaintiff appealed to the judge-in-chambers.

The defendant argued that the shortfall arose only because of the negligence of the receiver and manager in the discharge of his duties. It was also alleged that the receiver and manager had also held back crediting the borrower with the proceeds of the sale of the assets for

an unreasonable length of time and for which default interest was charged against the borrower. The defendant also described as questionable the decision of the receiver and manager to borrow the sum of $1.5m from a bank and which was repaid in priority to the amounts owing under the debentures.

For the plaintiff, it was contended that the defendant was estopped from raising the complaints as by the terms of the guarantee, it had contracted away its rights to do so. It was also contended for the plaintiff that the receiver and manager was the agent of the borrower and any negligence on his part could not be brought home to the plaintiff or the consortium.

Held, allowing the appeal:

(1) The terms of the guarantee had the effect of preventing the guarantors from effectively complaining that the securities were released for less than their worth.

(2) Summary judgment should not be granted when any serious conflict of the facts or any real difficulty as to a matter of law arises. But however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable, it will give final judgment.

(3) The effect of the terms of the debenture was that the receiver and manager in exercising his powers will act as agent of the borrower.

(4) A mere contention, without any acceptable basis for it, that the amount realized for the assets was significantly less than what could have been realized was not good enough to satisfy the court that there was a bona fide triable issue in negligence.

(5) The defendant had not shown anything that suggested that the raising of the loan of $1.5m was not necessary or was improperly done.

(6) The agreement for the sale of the assets provided that the money paid had to be held by the solicitors until certain matters had been attended to or had happened. In the meantime, the money was held in interest-earning fixed deposits and later released together with the earned interest. Therefore, the complaint that moneys realized from the sale of assets were not forthwith credited to the account of the borrower certainly did not provide any, not to speak of a bona fide, triable issue.

[Bahasa Malaysia summary

Suatu konsortium institusi kewangan, yang termasuk plaintif dan di mana plaintif bertindak sebagai ejen konsortium itu, telah memberi kemudahan kredit kepada sebuah syarikat. Jaminan untuk kemudahan itu termasuk debentur yang mewujudkan gadaian tetap ke atas tanah tertentu dan gadaian terapung ke atas, antara lain, akujanji peminjam. Juga terdapat jaminan bersama dan berasingan berkenaan wang yang diberi di bawah kemudahan yang dilaksanakan oleh defendan dan sebuah syarikat yang lain.

Peminjam telah ingkar dalam pembayaran baik dan plaintif bagi pihak konsortium telah melantik seorang penerima dan pengurus peminjam. Penerima dan pengurus nampaknya telah mengendalikan perniagaan peminjam itu untuk sewaktu dan kemudiannya telah menjual aset peminjam dan akhirnya memberi kutipan wang penjualan kepada plaintif. Terdapat kurangan dan plaintif telah menuntut sebahagian daripada kurangan itu yang perlu dibayar oleh defendan di bawah jaminan itu. Defendan gagal membayar amaun itu dan plaintif telah memulakan tindakan until mendapatkan balik amaun itu. Plaintif telah memohon untuk mendapat penghakiman terus terhadap defendan tetapi penolong kanan pendaftar telah menolak permohonan itu. Plaintif telah merayu kepada hakim dalam kamar.

Defendan telah berhujah bahawa kurangan itu timbul hanya kerana kecuaian penerima dan pengurus apabila melaksanakan tugasnya. Juga dikatakan bahawa penerima dan pengurus telah menangguh membayar kepada peminjam hasil kutipan dari penjualan aset untuk jangka masa yang tidak munasabah dan atas mana faedah ingkar dikenakan terhadap peminjam. Defendan juga mengesyakkan keputusan penerima dan pengurus untuk meminjam wang sebanyak $1.5 juta daripada bank dan yang telah dibayar balik secara prioriti dibandingkan dengan amaun yang terhutang di bawah debentur itu.

Bagi pihak plaintif, telah dihujahkan bahawa defendan telah diestop dari membangkitkan aduan kerana menurut terma jaminan itu, ia telah menyerah melalui kontrak haknya membuat demikian. Juga dihujahkan bagi pihak plaintif bahawa penerima dan pengurus itu adalah ejen peminjam dan sebarang kecuaian pada pihaknya tidak boleh ditanggung oleh plaintif atau konsortium itu.

Diputuskan, membenarkan rayuan itu:

(1) Terma jaminan itu mempunyai kesan menghalang penggerenti daripada membangkitkan aduan secara berkesan yang jaminan telah dijual dengan harga yang kurang daripada nilainya.

(2) Penghakiman terus tidak patut diberi apabila percanggahan fakta yang serius atau sebarang kesusahan sebenar tentang perkara undang-undang timbul. Tetapi walau bagaimanapun susahnya perkara undang-undang itu, sebaik sahaja ia difahami dan mahkamah berpuas hati bahawa ia benar-benar tidak boleh dipertikaikan, mahkamah akan memberi penghakiman muktamad.

(3) Kesan terma debentur itu adalah bahawa penerima dan pengurus apabila menggunakan kuasanya akan bertindak sebagai ejen peminjam.

(4) Suatu pendapat sahaja, tanpa sebarang dasar yang boleh diterima untuknya, bahawa amaun yang direalisasi untik aset itu adalah nyata sekali kurang daripada apa yang mungkin boleh direalisasi tidak cukup untuk memuaskan makamah bahawa terdapat suatu isu kecuaian bona fide yang boleh dibicarakan.

(5) Defendan tidak menunjukkan sebarang perkara yang menunjukkan bahawa pinjaman $1.5 juta tidak perlu atau tidak dibuat dengan betul.

(6) Perjanjian untuk menjual aset memperuntukkan bahawa wang yang telah dibayar mesti dipegang oleh peguamcara sehingga perkara yang tertentu telah diuruskan atau telah berlaku. Sementara itu, wang itu akan diletakkan di dalam simpanan tetap yang memungut faedah dan dilepaskan kemudian bersama dengan faedah yang diperoleh. Dari itu, aduan bahawa wang yang telah direalisasikan daripada penjualan aset tidak dikreditkan dengan segera ke dalam akaun peminjam sememangnya tidak menimbulkan sebarang isu yang boleh dibicarakan, apatah lagi isu bona fide.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–457/92.]

Cases referred to

1 *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267 (folld)
2 *Perry v National Provincial Bank of England* [1910] 1 Ch 464 (folld)
3 *O'Day v Commercial Bank of Australia Ltd* (1933) 50 CLR 200 (folld)
4 *Roynat Ltd v Denis et al* 139 DLR (3d) 265 (folld)
5 *Cow v Casey* [1949] 1 KB 481; [1949] 1 All ER 197 (refd)
6 *Lathom v Greenwich Ferry Co* [1985] WN 66 (refd)

Legislation referred to

Contracts Act 1950 s 94
National Land Code 1965
Rules of the High Court 1980 O 14

Yoong Sin Min and *Karen Kaur (Shook Lin & Bok)* for the plaintiff/appellant.

Aggie Chew (Cheang & Ariff) for the defendant/respondent.

Cur Adv Vult

VC George J: This is an appeal by the plaintiff against the refusal by the senior assistant registrar to give it an O 14 judgment.

A consortium of financial institutions including the plaintiff and with the plaintiff acting as the agent of the consortium, had provided certain credit facilities to Malaysian Prestressed Concrete Strand Manufacturing Sdn Bhd ('the borrower'). The security provided for the facilities were a debenture creating a fixed charge over certain lands and a floating charge over, inter alia, the undertakings of the borrower, an assignment of the agreement evidencing ownership of those lands and a charge (under the National Land Code 1965) held in escrow over the said lands. There was also a joint and several guarantee (in respect of repayment of the moneys provided under the facilities) by on Malayan Ropes Bhd and the defendant, the defendant's liability being limited to 14% of the maximum recoverable amount.

The borrower defaulted in the repayment. The plaintiff on behalf of the consortium had the debenture crystallized and appointed a receiver and

manager who apparently managed the business of the borrower for a while and thereafter sold off the assets of the borrower under his control and eventually remitted the proceeds of the sale to the plaintiff. There was a shortfall and upon the defendant not meeting a demand made on it for its 14% share of the shortfall the instant action was filed.

For the defendant, it was contended that there was the alleged shortfall only because of the negligence of the receiver and manager as the agent of the consortium in the discharge of his duties as receiver and manager. It was contended on behalf of the defendant that had there been a proper discharge by the receiver and manager of his duties there would not have been a shortfall — at worst the amount of the shortfall would have been significantly less than what it was and until the quantum of what could have been obtained was ascertained, the plaintiffs were not entitled to summary judgment.

The negligence alleged against the receiver and manager, shortly stated, is that he had not obtained a proper valuation of the assets, had not properly or adequately advertised the proposed sale and had sold the assets at an amount that was significantly less than had the sale been effected properly.

The defendant also complained that not only was the receiver and manager negligent but he had also held back crediting the borrower with the proceeds of the sale of the assets for an unreasonable length of time during and for which period the borrower had default interest charged against it. Accordingly, it was submitted that if the plaintiff was entitled to judgment, it would in any event be for a lesser amount than prayed for.

In the course of the receiver and manager managing the undertakings of the borrower, it had borrowed some $1.5m from the Oriental Bank Bhd which was, with the consent of the consortium, repaid in priority to the amounts owing under the debenture. The defendant said that their doing so was questionable and provides another triable issue.

For the plaintiffs, it was contended that the guarantor defendant was by the terms of the guarantee estopped from raising any of the complaints that they raised. The submission was that the guarantor had contracted away its right to raise the complaints it raised. It is settled law that a guarantor can contract away rights which he would otherwise have. It depends on the terms of the guarantee. In *Heng Cheng Swee v Bangkok Bank Ltd*[1] the Federal Court pointed out at p 274 that:

> A contract of guarantee, like all other contracts, depends primarily upon its expressed terms and the respective rights of the parties must be gathered from the guarantee form used in a particular case. It should be strongly emphasised that the effect of a guarantee depends very much on the form of words used in the contract.

And in *Perry v National Provincial Bank of England*[2] Cozens-Hardy MR said at p 471:

> This is a curious case arising out of the law of principal and surety. It is important to distinguish clearly between the rights of a surety under an ordinary contract of suretyship not containing any special provisions and the rights of a surety where the instrument creating the suretyship contains certain special clauses. It is elementary law that in a simple case of principal and surety the surety is

A discharged if the creditor gives time to the principal or does certain other acts; and, a fortiori, if the creditor releases the principal debtor, of course the surety is released too. There are a certain number of acts which will not release the surety if, when the act in question is done, there is a reservation of rights against the surety. A common instance of this is giving time. When you find in the instrument of suretyship itself a provision that the surety shall be liable notwithstanding certain acts being done by the creditor which would otherwise release him, these doctrines have no application at all. It is not then a simple contract of suretyship. It is true that in one sense it is a contract of suretyship, but it is a contract of suretyship containing special clauses which deliberately exclude certain rights which the surety would otherwise have had.

Even the right of subrogation can be contracted away. In *O'Day v Commercial Bank of Australia Ltd*,[3] a decision of the High Court of Australia, Dixon J said, commencing at the bottom of p 219:

> The ordinary rights of a surety in respect of securities given by the principal debtor do not exist in the present case. Each of the instruments of suretyship contains elaborate provisions which effectually disentitle the surety to any interest in, and to any rights in respect of the security whether by way of subrogation or otherwise. It follows that no reliance could be placed upon a contention that the acts of the Bank amounted to a wrongful dealing with securities discharging the surety.

The principle was accepted in Canada as can be seen in *Roynat Ltd v Denis et al*,[4] where at p 279 the judge found assistance from an earlier judgment of the Supreme Court of Canada referred to at pp 426–427:

> Despite this rule, it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule requiring preservation of his security. If authority is needed for such a proposition, it may be found in *Rose v Aftenberger et al* (1969) 9 DLR (3d) 42 at p 47, (1970) 1 OR 547 (CA) at p 552, where Laskin JA, as he then was, speaking for the Ontario Court of Appeal, said:
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> > 'The law is that sureties are entitled to the benefits of any security taken by a creditor who has their promise to pay the debt of the principal obligor, unless the sureties have contracted themselves out of this right or are estopped from asserting it. In this connection, it is immaterial when the security was taken or whether the guarantor knew of it at the time.'

In the instant case, purportedly in the context, counsel for the plaintiffs referred to, inter alia, ss 4.01, 5.01 and 6.01 of the guarantee which for ease of reference is reproduced here:

> 4.01 The obligations of the guarantors shall not be discharged except by performance and then only to the extent of such performance. Such obligations shall not be subject to any prior notice to or demand to the guarantors with regard to any default of the borrower and shall not be impaired by any extension of time forbearance or concession given to the borrower or any assertion of or failure to assert any right or remedy against the borrower or in respect of any security created by or in pursuance of the security documents and or any modification or amplification of the provisions thereof contemplated by the terms thereof or any failure of the borrower to comply with any requirements of any law regulation or order in Malaysia or of any political subdivision or agency thereof.

5.01 The agent and the participants shall be at liberty without thereby affecting their rights against the guarantors under this guarantee to grant to the borrower any time or indulgence for the payment of moneys due to the agent and or the participants or for the observance of any term stipulation covenant or undertaking on the part of the borrower to be observed and performed under the terms of the security documents and of this guarantee or to vary or substitute the securities held by the agent and or the participants or any of them or to release any such securities or part thereof.

6.01 This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the agent and or the participants or any of them for all or any part of the moneys hereby guaranteed nor shall such collateral or other security or lien to which the agent and or the participants or any of them may be otherwise entitled or the liability of any person or persons or corporation not parties hereto for all or any part of the moneys hereby secured be in any way prejudiced or affected by this present guarantee. The guarantors shall make no claim to such collateral or other security or any part thereof or any interest therein unless and until the agent and or the participants shall have received the full amount hereby guaranteed hereunder.

In my judgment, the guarantors agreeing in s 4.01 of the guarantee document that their obligations 'shall not be impaired ... by any assertion of or failure to assert against the borrower or in respect of any security ...' read together with agreed indulgence set out in s 5.01 that the consortium 'shall be at liberty without thereby affecting their rights against the guarantors ... to vary or substitute the securities held ... or to release any such securities or part thereof' has the effect of preventing the guarantors from effectively complaining that the securities were released for less than their worth which in effect is what the defendant is complaining about. No doubt the last sentence in s 6.01 of the guarantee has the effect of preserving the Contracts Act 1950 s 94 right of subrogation by the guarantors in respect of the securities provided that the consortium shall have received the full amount guaranteed. However this sentence has in the context to be read with the implied proviso which could be worded as 'provided that the securities had not been previously released pursuant to s 5.01'. If the consortium is entitled without impairing its rights against the guarantors to release any of the securities without any consideration for so doing, which is what is expressly provided for by s 5.01, it is equally entitled to release the securities in consideration of the receipt of $14,400,000 as had happened and the guarantors are contractually estopped from seeking to know why only that amount was realized.

In any event, the alleged negligence of the receiver and manager that has resulted in the alleged impairment of the guarantors' right of subrogation, in the context, turns on the receiver and manager being in fact the agent of the consortium (or of the plaintiff as 'agent' of the consortium).

On behalf of the plaintiff it was contended that there was no need for a trial to conclude that on a true construction of the debenture the receiver and manager, although appointed by the plaintiff, was at all relevant times in fact the agent of the borrower and accordingly any negligence on his part could not be brought home to the plaintiff or to the consortium. To this, for

A the defendant, it was contended that the contention and the counter-contention provided a triable issue. It was also in effect contended by the plaintiff that in any event, the allegation of negligence was made frivolously without any basis and did not provide a bona fide triable issue.

It should not be overlooked that summary judgement under O 14 should not be granted when any serious conflict of the facts or any real difficulty as to a matter of law arises. But however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable, it will give final judgment — see *Cow v Casey*.[5]

Now, as has been seen, what the debenture purports to create was as a continuing security by way of a 'first fixed charge' the whole of the said land and by way of a 'first floating charge' all the undertakings and 'other moveable properties and assets' of the borrower. The right to the land was not by way of a title deed but was set out in an agreement and the borrower was to assign its rights under the agreement to the plaintiff and was also to provide a charge in escrow of the land.

Article 5 of the debenture deals with the appointment and powers of the receiver and manager. Section 5.01(c) of art 5 empowers the plaintiff to appoint in writing a receiver and manager and also empowers the plaintiff to remove the receiver and manager and appoint another in his stead. The section does not state whose agent the receiver and manager is to be.

Section 5.02 sets out the express powers of the receiver and manager. He is empowered, inter alia, in the name of the borrower or on its behalf to get in the properties charged, carry on or manage the business of the borrower, sell or concur in the selling of the properties of the borrower, appoint manager' agents, officers and servants and workmen to achieve the purposes of the receivership.

The debenture then deals in s 5.03 with the sale of the lands under the provisions of the National Land Code. Section 5.06 deals with the granting of a power of attorney. The borrower appoints the plaintiff and certain of its officers to be 'its attorney or attorneys for it and in its name and on its behalf to do and execute any deed, assurance or act which may be required or may be deemed proper on any sale or disposition by the plaintiff or by any receiver and manager ...'

The document is certainly not a masterpiece of draftsmanship. But there is no need for a trial to conclude, that it can be gathered from the document itself that while it provided for the contingency of the plaintiff proceeding with a foreclosure action in respect of the National Land Code Charge without first having a receiver and manager appointed, it also provided for the situation of the receiver and manager being appointed. It seems to me beyond any argument that the effect of s 5.02 is that the receiver and manager in exercising his powers will act as agent of the borrower doing everything he does 'in the name of' or 'on behalf of' the borrower. The clincher is para (f) of s 5.02 which reads as follows:

> to do all such other acts and things as may be considered to be incidental or conducive to any of the matters and powers aforesaid and which he may or can do as agent of the borrower.'

Section 5.03 does not help because it deals with the plaintiff applying the proceeds of the sale of the lands on a foreclosure action and has no other application.

The power of attorney provision also clearly has the effect of appointing the plaintiff and its officers as agents of the borrower. The words used are 'to be its attorney or attorneys for it and in its name and on its behalf ...' 'it' and 'its' being references to the borrower.

Although the agency point as taken is perhaps not a simple point, all that can be said about it can and has been said at this stage. In my judgment, it is virtually inarguable that in fact the receiver and manager had to and acted as agent of the borrower.

The negligence point also has no merit.

The *New Straits Times* in which the receiver and manager advertised has certainly a wider local readership than any specialist magazine, journal or periodical including most (if not all) the readers of any such local specialist publication. Whether a greater response would have been achieved by advertizing in foreign journals is, I think, mere speculation. In any event, apart from Southern Iron and Steel Holdings Sdn Bhd and the Japanese Corporation Mitsui & Co Ltd, two Malaysian public companies and two Malaysian private companies responded to the advertisement. I am not satisfied that the lack of advertisement point provides a bona fide triable issue.

The defendants question the valuation that the receiver and manager had obtained, which he obtained no doubt to enable him to know whether any offers made were worth considering. The basis for suggesting that the valuation of the 'special equipment and plant' were not good enough are the exh TH-5 referred to in para 24 of Tadao Hayashi's affidavit encl 9 and an alleged valuation by TO Aziz Sdn Bhd referred to in para 24 of encl 9 supported by the exh TH-6 which is referred to by the deponent as a copy of the valuation. However, exh TH-5 has in fact no reference to any valuation of the plant and equipment and exh TH-6 is a one-page document entitled 'Certificate of Valuation' which simply states 'value attributable to plant and machinery $23,950,000' without giving any basis for such certification. Against that is Colliers Jordan Lee & Jaafar Sdn Bhd's fairly comprehensive valuation setting out, inter alia, the basis of their valuation. In the final analysis, it could be said that the real market value is what is offered by a willing buyer and is acceptable by a willing seller. What was offered was consistent with the Colliers Jordan Lee Jaafar's valuation and inconsistent with the director's assessment of the value. It is relevant to note that neither the borrower company nor any of its directors or any of the guarantors have come up with anybody to offer anything more than was offered by the company that eventually bought the plant and machinery. On the one hand, there is a valuation by professional valuers and a response to the advertisement by a number of companies specializing in the relevant industry or related industries and an offer somewhat more than the valuation but not inconsistent with it and on the other hand there is a mere contention, without any acceptable basis for it, that the amount realized for the plant and equipment was significantly less than what could have been

realized. That is not good enough to satisfy the court that there is a bona fide triable issue in negligence.

As to the $1.5m borrowing from the Oriental Bank and that that amount had been repaid to the bank in priority to the other debts, s 5.02(b) of the debenture provides that the receiver and manager was entitled to carry on the business of the borrower company for which purpose it could, inter alia, raise or borrow money that may be require. *Kerr on Receivers and Administrators* (17th Ed) at p 225 cites *Lathom v Greenwich Ferry Co*[6] to state:

> Where a receiver and manager ... has been authorised to raise money, this gives him by implication power to create a charge to secure the money in priority to existing debentures.

Clearly it was invoking that s 5.02(b) power that the receiver and manager borrowed the money and unless it can be shown that the raising of that amount was improperly done, that point is a non-point. The defendants have not shown anything that suggests that the raising of that loan was not necessary or improperly done. On the other hand, the plaintiffs have shown that the $1.5m raised from the Oriental Bank was relevant to the running of the business and that in fact it had been 'ploughed back', as it were, into the company.

The only other point that needs to be dealt with is the complaint that moneys realized from the sale of assets were not forthwith credited to the account of the borrower. The agreement for the sale of the assets provided that the money paid had to be held by the solicitors until certain matters had been attended to or happened. In the meantime, the amounts were held in interest-earning fixed deposits and when under the terms of the agreement the money could be released, it was released together with the earned interest. It certainly does not provide any, not to speak of a bona fide, triable issue.

The plaintiffs were entitled to summary judgment. The appeal is allowed with costs here and of the court below. There will be summary judgment for the plaintiffs as prayed in their amended O 14 summons encl 47.

Appeal allowed.

Reported by PS Ranjan